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Nos. 88-449, 88-513

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

JOHN F. HEALY, et al.
Appellants,

v.

THE BEER INSTITUTE, et al.
Appellees.

WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC.
Intervenor-Appellants,

v.

THE BEER INSTITUTE, et al.
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE APPELLANTS JOHN F. HEALY, et al.

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This Brief responds to the Brief for the Appellees, The Beer Institute, et al. ("Brewers"), and to the Brief of the Distilled Spirits Council of the United States, Inc. ("Distillers") and the Commonwealth of Pennsylvania ("Pennsylvania") as Amici Curiae.

ARGUMENT

Certain factual representations made by the Brewers, Distillers and Pennsylvania are incorrect or distorted. They are addressed as follows:

As part of their justification for charging more for beer in Connecticut than in the surrounding states, the Brewers contend that the market in Connecticut is more strictly regulated, and give example by stating that Connecticut law requires exclusive territories for beer wholesalers. Brewers' Brief, p. 4. This is incorrect. Territories are selected and established at the choice of the Brewers. *See* 7 Reg. Conn. Agencies, Liquor Cont. Sec. 30-6-B7 (1985), J.A. at p. 159A; Response to Brewers' 9(c) Statement of Facts, par. 3, J.A. at pp. 152A–53A. Also, their statement that Connecticut prohibits price discounts, also at p. 4, is incomplete. The functional equivalent of such price promotions can be achieved in Connecticut by the use of a non-discriminatory "post off." *United States Brewers Ass'n, Inc. v. Healy*, 532 F. Supp. 1312, 1319 n. 29 *rev'd on other grounds* 692 F.2d 275 (2nd Cir. 1982) *aff'd* 464 U.S. 909 (1983) *(Healy I)*.

The Brewers additionally state that Connecticut "concedes" that the purpose of the beer price affirmation law was to increase the purchase of beer by Connecticut residents within the State "*by eliminating lower beer prices in neighboring States.*" Brewers' Brief, p. 5 (Emphasis added). This is a distortion. Connecticut exerts no control over retail prices in other States. It exerts no control over wholesale prices in other States. By this affirmation law, Connecticut does regulate the Brewers' price of beer, but only when it is imported and sold in Connecticut. Brewers are free to select and change prices in other States, subject only to price rules in those other States. The conclusion of the Court in *Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 43 (1966), that "It is by no means clear . . . that [affirmation] must inevitably produce higher prices in other States . . . rather than the lower prices sought for [the affirmation State]," is similarly applicable in the instant case. Indeed, there is no price movement evidence on record in this case.[1]

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[1] Brewers and their Amici attempt to introduce new evidence in this case by citing to a published study which concludes that all affirmation laws

(continued)

The Brewers also complain that there is no evidence in the record to support Connecticut's belief that residents who purchase beer from border-state retailers may violate Connecticut's personal importation restrictions. Brewers' Brief at p. 32 *citing* Conn. Gen. Stat. Sec. 12-436 (Four gallon limit). The basis for the concern about importation violations is obvious. In the past, Connecticut residents have crossed state borders *in significant numbers* to purchase beer at lower retail prices. *Healy I*, 532 F. Supp. 1312, 1316 (Emphasis added). The purpose of the beer price affirmation statute was to lower the price of beer to Connecticut consumers thereby increasing the purchase of beer by Connecticut residents within the state, and generating increased tax revenues. *Id.* The concern here was not an occasional trip by a border resident to a liquor store across the state line. The concern was that . . . "so many of our consumers had gotten in the habit of going across the border." Remarks of Representative Moynihan, J.A. at p. 57A. Even the Brewers admit to widespread shopping of Connecticut residents for beer in neighboring States, when it suits their advocacy. *See* Brewers' Brief, p. 27. The Brewers obviously attempt to dilute the problem Connecticut was trying to rectify. Connecticut, on the other hand, has not forgotten the magnitude of the consumer drain. The threat of violation of the personal importation law is no illusion.

Finally, the Amici Briefs of the Distillers and Pennsylvania describe a parade of horrors in an attempt to demonstrate that if other states promulgate beer affirmation laws, the result could be price gridlock and one, permanent, nation-

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[1] *(continued)*
adversely affect interstate commerce. *See, e.g.*, Brewers' Brief, pp. 20, 26, 37, 38 *citing* Pustay & Zardkooki, *An Economic Analysis of Liquor Price Affirmation Laws: Do they Burden Interstate Commerce?*, 48 La. L. Rev. 649 (1988). A battle of such experts took place in 1982 in the first litigation concerning Connecticut's affirmation law. *See Healy I*, 532 F. Supp. 1312, 1315. The Brewers failed to make their case then. *Id.* at 1326 ns. 49, 50. They cannot seek *de novo* review now on appeal in this second challenge. *See Maine v. Taylor*, 477 U.S. 131, 145 (1986); *Russell v. Southard*, 53 U.S. (12 How.) 139, 159 (1851).

wide price ceiling. *See* Distillers' Brief, pp. 15-18; Pennsylvania's Brief, pp. 10-13. The Court will review the practical effect of the law under the Commerce Clause, *Brown-Forman Distillers v. N.Y. Liquor Authority*, 476 U.S. 573, 583 (1986), but not worst-case hypotheticals. If the hypotheticals were real, then such should have been the national experience by now. Simultaneous affirmation provisions have been in effect with respect to distilled spirits since 1937 and statutory forms of affirmation on distilled spirits have been in effect since 1964. *See* Connecticut's Brief, p. 21. The absence of evidence of national price gridlock demonstrates the real effect of administrative exemptions and the ability of Brewers and other manufacturers to avoid adverse affirmation consequences by the temporary, strategic withholding of products from sale. *See* Connecticut's Brief, p. 13, n. 5.

With these corrections in mind, certain legal issues meriting reply are discussed *seriatim:*

I. THE AFFIRMATION LAW IS NOT PROTECTIONIST BECAUSE ALL PRODUCTS HAVE EQUAL ACCESS TO ALL MARKETS.

Assuming that Connecticut has successfully removed the impermissible extraterritorial effect of its affirmation law by the 1984 amendments promulgated by the Connecticut General Assembly, we maintain that the law does not otherwise constitute protectionist legislation prohibited under the dormant provisions of the Commerce Clause of the United States Constitution. Clearly, the affirmation law does not discriminate against interstate commerce directly: the law applies evenhandedly on its face to all brewers, whether they are local or out-of-state.[2] It does not discriminate against wholesalers. The wholesalers in these border states do not

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[2] Furthermore, there are no in-state brewers to be favored. *The Beer Institute v. Healy*, 849 F.2d 753, 755 (2nd Cir. 1988) *rev'd* 669 F. Supp. 543 (D. Conn. 1987) *(Healy II)*.

directly compete against Connecticut wholesalers. They sell to retailers in their respective states. Indeed, a Connecticut retailer may purchase only from a licensed Connecticut wholesaler. Conn. Gen. Stat. § 30-76.

Nevertheless, the Brewers advocate that the law destroys the competitive advantages of businesses in neighboring states vis-a-vis Connecticut businesses. Out-of-state retailers, they argue, will lose business from Connecticut customers if the price gap narrows, *see* Brewers' Brief, p. 27, and out-of-state consumers will lose if out-of-state retail prices are adjusted upward in response to Connecticut's law.[3] Even assuming that there was empirical evidence of these occurrences in this case (which there is not), such a circumstance does not necessarily constitute unconstitutional protectionism. If it did, no state could ever do anything to improve its economic base, or enact consumer protection legislation. The real test involves product access to markets, and such access remains inviolate in this case.

The landmark dormant commerce clause cases involving movement of goods plainly focus on product access to markets. Where product access is restricted based on economic bias, the law has been struck down. *See, e.g., Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) (Law restricted import of Vermont milk to protect New York producers); *Hood & Sons v. DuMond*, 336 U.S. 525 (1949) (Law restricted export of New York milk to protect local producers); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951) (Law restricted import of Illinois milk to protect Madison, Wisconsin producers); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (Law restricted export of cantaloupes from Arizona to advance prestige of

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[3] The Brewers' presumption in championing the interests of retailers must be accepted with some skepticism. They have no legal interest in, or ability to dictate, such retail prices. Indeed, retail price maintenance in the liquor industry was outlawed as anti-competitive in *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980). The Brewers' interest in accomplishing indirectly that which they cannot do directly should not be countenanced.

local producers); *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977) (Law restricted apple imports from Washington to protect North Carolina growers); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (Law barred import of waste into New Jersey). On the other hand, where market access remains equally open, the fact that participants in the distribution chain must conform their practices to local policy does not violate the Commerce Clause. *See, e.g., Breard v. Alexandria*, 341 U.S. 622 (1951) (Restriction on door-to-door salesmen did not harm the market); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) (Elimination of producer-owned gas stations did not harm the market); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (Prohibition on plastic milk containers did not stop milk from flowing freely across the Minnesota border). Thus, distributor inconvenience is not a constitutional injury.

The constitution goal involved was simply put by the Court in *Hood & Sons v. DuMond* as follows:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs, duties or regulations exclude them. Likewise, every consumer may look to the full competition from every producing area in the Nation to protect him from exploitations by any. Such was the vision of the founders; such has been the doctrine of this Court which has given it reality.
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> *Hood*, 336 U.S. 525, 539.

On the other hand, the Court in *Exxon Corp. v. Governor of Maryland* drew the line between unconstitutional protectionism and valid local economic regulation:

> We cannot accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market. *See Breard v. Alexandria*, 341 U.S. 622. As indicated by the Court in *Hughes* [*Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976)], the Clause protects the interstate market, not particular interstate firms, from prohibition or burdensome regulations.
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> *Exxon*, 437 U.S. 117, 127-28; *see also CTS Corp. v. Dynamics Corp. of America*, 107 S.Ct. 1637 (1987).

In the instant case, there can be no question of free access to the products involved. No one argues that their products cannot get to Connecticut consumers, nor that residents of other States cannot get Connecticut products because of Connecticut pricing restrictions. The Brewers complain that their pricing practices are complicated or inconvenienced by the law. However, this is not a constitutional injury. As in *Breard v. Alexandria*, interstate commerce knocks on the door; Connecticut merely regulates the knock so that the interests of the Connecticut consumer may be protected by public, as distinct from private, action. The Brewers' complaint that this could cause them to alter their pricing practices in other States is a threat which could be lodged against any consumer-oriented law Connecticut writes. The fact remains that any business organization which chooses to operate in more than one state will be subject to multiple and even inconsistent regulations. Any such business must simply be prepared to conform its various local operations to more than one set of laws. Regan, *Siamese Essays*, 85 Mich. L. Rev. 1865, 1881 (1987). The test, under the dormant provisions of the Commerce Clause, is market access. Connecticut's law passes the test.

II. THE CASE OF *SEAGRAM & SONS, INC. V. HOSTETTER* SHOULD NOT BE OVERRULED.

The Brewers and Pennsylvania invite the Court to overrule *Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966). *See* Brewers' Brief, p. 36; Pennsylvania's Brief, p. 36. In that case, the Court upheld New York's 1964 retrospective affirmation law on its face, declaring, "The mere fact that [the affirmation law] is geared to appellants' pricing policies in other states is not sufficient to invalidate the statute." *Id.* at 43. In *Brown-Forman Distillers*, this Court, *in dictum*, questioned the continuing validity of *Seagram*, noting:

> While we hold that New York's prospective price affirmation statute violates the Commerce Clause, we do not necessarily attach constitutional significance to the difference between a prospective statute and the retrospective statute at issue in *Seagram*. Indeed, one could argue that the effects of the statute in *Seagram* do not differ markedly from the effects of the statute at issue in the present case. If there is a conflict between today's decision and the *Seagram* decision, however, there will be time enough to address that conflict should a case arise involving a retrospective statute. Because no such statute is before us now, we need not consider the continuing validity of *Seagram*.
>
> *Brown-Forman*, 476 U.S. 573, 584 n. 6.

Insofar as the affirmation law in the instant case is not of the retrospective variety, this is reason enough to leave the question of the continuing validity of *Seagram* for a more appropriate case.

Furthermore, it is far from clear whether retrospective affirmation could be attacked successfully. Retrospective affirmation does not possess the impermissible extraterritorial thrust condemned in *Brown-Forman*. *See* Regan, *Siamese*

Essays, 85 Mich. L. Rev. 1865, 1905 (1987) *but see* Greenberg, *Note, Liquor Price Affirmation Statutes and the Dormant Commerce Clause*, 86 Mich. L. Rev. 186 (1987). Nevertheless, such a law must still be tested concerning its effect on market access, a task clearly outside the scope of this appeal.

Thus, to the extent that the *Seagram* case holds that out-of-state price referencing does not, in itself, violate the Commerce Clause, the case is still good law. It is not out of line with the landmark dormant Commerce Clause cases. Indeed, in other contexts, uniformity in state liquor regulation has been compelled. *See South Dakota v. Dole*, 107 S.Ct. 2793 (1987) (Uniform drinking age requirement for transportation funds upheld).

III. THIS APPEAL SHOULD BE RESOLVED IN FAVOR OF CONNECTICUT ON THE ISSUE OF INDIRECT BURDEN ON INTERSTATE COMMERCE.

The Brewers do not discuss the constitutionality of Connecticut's beer affirmation law under the second tier of the Commerce Clause test for state economic regulation: that which involves balancing indirect burdens on interstate commerce against the State's interest at stake. *See Brown-Forman*, 476 U.S. 573, 579. The issue was resolved in Connecticut's favor in the trial court below. *See The Beer Institute v. Healy*, 669 F. Supp. 543, 553 (D. Conn. 1987) *rev'd on other grounds* 849 F.2d 753 (2nd Cir. 1988) *(Healy II)*; J.A. at p. 184A. On appeal in the Second Circuit the issue was not reached, but this Court noted probable jurisdiction over the issue in the companion case of *Wine and Spirits Wholesalers of Connecticut, Inc. v. The Beer Institute, et al.*, No. 88-513. We continue to urge the Court to resolve the issue in favor of Connecticut as argued in Connecticut's Brief at pp. 20–22.

CONCLUSION

In all other respects, the Appellants rely on their Brief dated December 29, 1988, and urge the Court to order the judgment of the United States Court of Appeals for the Second Circuit be reversed, and the case remanded with instructions to enter judgment for the Appellants.

Respectfully submitted,
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